DECISIONS OF THE SUPREME COURT OF THE UNITED STATES ON CONSTITUTIONAL QUESTIONS.[1] II

1914–1917

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II. POLICE POWER

The decisions of the Supreme Court during the October terms of 1914, 1915, and 1916, indicate on the whole a more tolerant attitude towards the judgment of state legislatures on questions of the police power than one would be apt to infer from the criticisms called forth by the few cases in which laws were declared invalid. The cases on these questions gave rise to more diversity of opinion among the judges than did those arising under the commerce clause. In most of the important cases there was dissent, and several were decided by a vote of five to four. Chief Justice White, and Justices Van Devanter and McReynolds were opposed to the Oregon ten-hour law, the Washington compensation law and the Washington employment agency law; while Justices Holmes, Brandeis and Clarke were in favor of all three. On certain crucial questions these six justices seem quite likely to counteract each other, and leave the balance of power with Justices McKenna, Day and Pitney. Justices Pitney and Day were in favor of the ten-hour law and the compensation law and opposed to the employment agency law. Mr. Justice McKenna was in favor of the ten-hour law and the employment agency law and opposed to the compensation law. In the Oregon Minimum Wage Case, the court was divided four to four, Mr. Justice Brandeis not sitting. It is a natural inference from Mr. Justice Pitney's dissenting opinion in the

[1] For the first installment of this article see the *American Political Science Review* for February, 1918, pp. 17–49.

case sustaining the Adamson Law that he voted with the Chief Justice and Justices Van Devanter and McReynolds against the minimum wage law.

The Washington employment agency law came before the court in Adams v. Tanner.[2] The statute made it a criminal offense to collect fees from workers for furnishing them with employment or with information leading to such employment, thus going beyond the provision of the Michigan law, sustained in Brazee v. Michigan,[3] which penalized an employment agency sending one seeking employment to an employer who had not applied for help. In the Washington case the majority of the court accepted as true the statement made on behalf of the agencies that their business could not continue if they were forbidden to collect fees from workers, even though they were still permitted to charge a commission to employers. It regarded the business of getting jobs for workers as distinguishable from that of getting workers for jobs, and held that the statute was one of prohibition rather than one of mere regulation. The minority did not seriously contest these positions, so that the main issue between the judges was whether the business was useful. Mr. Justice McReynolds, for the majority, asserted that it was. Mr. Justice Brandeis, for the minority, adduced evidence to sustain the position that the abuses in the business were serious and could not be satisfactorily met by legislation less drastic than that which Washington adopted. Whether the majority did not regard the evidence as trustworthy, or whether it thought that the business, in spite of the unavoidable abuses, was still useful and protected by the Constitution is not made wholly clear.

Coppage v. Kansas[4] held that a state cannot forbid an employer to require of an employee or one seeking employment

[2] (1917) 244 U. S. 590. See 5 *California Law Review* 494, 85 *Central Law Journal* 111, 17 *Columbia Law Review* 635, 31 *Harvard Law Review* 490, 12 *Illinois Law Review* 428, 2 *Minnesota Law Review* 56, 5 *Virginia Law Review* 361, and 27 *Yale Law Journal* 134.

[3] (1916) 241 U. S. 340.

[4] (1915) 236 U. S. 1. See 49 *American Law Review* 596, 15 *Columbia Law Review* 272, 28 *Harvard Law Review* 496, 19 *Law Notes* 13, 13 *Michigan Law Review* 497, 63 *University of Pennsylvania Law Review* 566, 20 *Virginia Law Register* 954, 2 *Virginia Law Review* 540, and 24 *Yale Law Journal.*

an agreement not to become or remain a member of a labor union. Mr. Justice Pitney saw in the statute no other object than that of removing inequalities of fortune or of interfering with the powers and disabilities which flow from inequality of fortune, and this he found no proper object of the police power. Mr. Justice Holmes, in a brief dissent, said that "in present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him." And he added: "If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins." Mr. Justice Day also dissented, although he had been with the majority in Adair v. United States[5] which declared invalid a statute of Congress forbidding an interstate carrier to discharge an employee because of his membership in a union. He felt that the effects of the imposition forbidden by Kansas were much more serious and far-reaching than those likely to flow from the action prohibited by Congress, and that there was an important distinction between the exercise of the right to discharge at will and the imposition of a requirement that an employee, as a condition of employment, shall make a particular agreement to forego a legal right. He cited decisions sustaining other statutes which were rendered necessary by the fact that the inequality of the bargaining power of employees rendered them incapable of protecting themselves from impositions hostile to the public interest. Mr. Justice Hughes, who was not on the bench when the Adair case was decided, concurred in the dissent of Mr. Justice Day.

Three cases sustained state laws limiting hours of labor. Miller v. Wilson[6] and Bosley v. McLaughlin[7] involved eight-hour laws for women in various employments. In Bunting v.

[5] (1908) 208 U. S. 161.

[6] (1915) 236 U. S. 373.

[7] (1915) 236 U. S. 385. See 50 *American Law Review* 97, 3 *California Law Review* 323, and 13 *Michigan Law Review* 506. On the general subject, see Felix Frankfurter: "Hours of Labor and Realism in Constitutional Law," 29 *Harvard Law Review* 353.

Oregon,[8] the much-reviled Lochner v. New York[9] which in 1905 had declared unconstitutional a ten-hour law for bakers was quietly laid to rest, without even being mentioned at its own obsequies. Chief Justice White, and Justices Van Devanter and McReynolds dissented, but without assigning their reasons. Mr. Justice Brandeis did not sit, having been of counsel. The Oregon statute was much broader than the bakery statute involved in the Lochner case, for it applied to men "in any mill, factory, or manufacturing establishment." Most of the opinion was concerned with questions raised by certain exceptions in the statute, and by the provision for extra rates of compensation for laborers permitted to work overtime in emergencies. It was contended that this made the statute really a wage law, but Mr. Justice McKenna answered that the purpose of the wage provisions was merely to deter employers from taking undue advantage of the permission to work employees overtime in certain contingencies. The reversal of the Lochner case is solemnized in the following language: "There is a contention made that the law, even regarded as regulating the hours of service, is not either necessary or useful for preservation of the health of employees. . . . The record contains no facts to support the contention, and against it is the judgment of the legislature and the supreme court [of Oregon]. . . ."

Two cases involved questions relating to wages. Rail & River Coal Co. v. Yaple[10] sustained the Ohio "run-of mine" or "anti-screen" law, thus affirming by unanimous decision the doctrine of McLean v. Arkansas,[11] from which Justices Brewer and Peckham had dissented. In Stettler v. O'Hara[12] the Oregon

[8] (1917) 243 U. S. 426. See 17 *Columbia Law Review* 538, 15 *Michigan Law Review* 584, 3 *Virginia Law Register*, n.s. 221, 5 *Virginia Law Review* 55, and 26 *Yale Law Journal* 607.

[9] (1905) 198 U. S. 45.

[10] (1915) 236 U. S. 338.

[11] (1909) 211 U. S. 539.

[12] (1917) 243 U. S. 629. See R. G. Brown, "The Oregon Minimum-Wage Cases," 1 *Minnesota Law Review* 471; T. R. Powell, "The Constitutional Issue in Minimum-Wage Legislation," 2 *Minnesota Law Review* 1, and "The Oregon Minimum-Wage Cases," 32 *Political Science Quarterly* 296. For a discussion of the decision in the state court, see 28 *Harvard Law Review* 89.

minimum-wage law was saved from being declared unconstitutional because the judgment of the court below had been in its favor, and the Supreme Court was evenly divided on the question. Mr. Justice Brandeis did not sit, having been of counsel. Had the case come from a court which had declared the statute unconstitutional, that judgment would have been affirmed, since under the rules an equally divided vote affirms the judgment below. The decree in such a case is of course not a precedent on the constitutional issue. Since this decision, two additional state courts have sustained minimum-wage laws,[13] and the question may soon be presented to the Supreme Court again in a case in which Mr. Justice Brandeis may sit.

Statutory changes in the law of torts were approved in an important series of cases. In Easterling v. Pierce,[14] the court reaffirmed previous holdings to the effect that a state may give retroactive application to a statute making proof of the happening of an accident give rise to a prima facie presumption of negligence, and may abrogate the fellow-servant rule as to employees of railroads and similar enterprises, although retaining the rule in general. In Jeffrey Mfg. Co. v. Blagg[15] the court dismissed a complaint based on alleged discriminatory features of the Ohio workmen's compensation statute. It held it proper to take the defenses of contributory negligence, assumption of risk, and the fellow-servant rule from employers who did not elect to accept the optional compensation act, although employers of less than five employees were not made subject to the act and therefore retained their ancestral common-law defenses. Northern P. R. Co. v. Meese[16] sustained a provision of the Washington compensation law which confined employees to their

[13] See 31 *Harvard Law Review* 1013. For articles dealing with the general subject of the constitutionality of what is commonly called "social legislation," see E. S. Corwin, "Social Insurance and Constitutional Limitations," 26 *Yale Law Journal* 431; A. M. Kales, "Due Process, the Inarticulate Major Premise, and the Adamson Act," 26 *Yale Law Journal* 519; E. R. Keedy, "The Decline of Traditionalism and Individualism," 65 *University of Pennsylvania Law Review* 764; F. R. Mechem, "The Changing Legal Order," 15 *Michigan Law Review* 185.

[14] (1914) 235 U. S. 380.

[15] (1915) 235 U. S. 571. See 50 *National Corporation Reporter* 506.

[16] (1916) 239 U. S. 614.

remedy against their employers under the act, and deprived them of their common-law action against third persons to whose negligence their misfortune was due.[17]

These three cases were forerunners to decisions affirming the power of the state to pass compensation acts which imposed liability on employers for injuries to their employees, even though no negligence on the part of the employer could be shown, and which fixed statutory rates of compensation to be awarded by an administrative commission. The objection to such legislation which the New York court of appeals had found fatal in Ives v. South Buffalo Ry. Co.[18] was that it imposed liability without fault. But Mr. Justice Pitney replied that "no one has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." And he added that "liability without fault is not a novelty in the law." The opinion made it clear that the court was passing on the particular statute before it, and was not deciding "whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead."

In New York Central R. Co. v. White,[19] which sustained the New York statute, the opinion compared the gains and losses to employers and employees from the change from the common-law to the statutory compensation plan, and found the alterations fundamentally fair to both. Various subordinate criticisms of compensation legislation were considered and refuted in Hawkins v. Bleakly,[20] which sustained the Iowa statute. The Washington law, sustained in Mountain Timber Co. v. Washington,[21] differed from the others before the court, in that

[17] For the results where statutes do not take away the common-law remedy against third persons, see 18 *Columbia Law Review* 598.

[18] (1911) 201 N. Y. 271.

[19] (1917) 243 U. S. 188. See T. R. Powell, "The Workmen's Compensation Cases," 32 *Political Science Quarterly* 542. See also 84 *Central Law Journal* 227, 15 *Michigan Law Review* 513, 1 *Minnesota Law Review* 449, 2 *St. Louis Law Review* 181, and 65 *University of Pennsylvania Law Review* 682.

[20] (1917) 243 U. S. 210.

[21] (1917) 243 U. S. 219. See 51 *American Law Review* 439, 54 *National Corporation Reporter* 410, and 26 *Yale Law Journal* 618.

insurance in a state fund was compulsory, and employers had to pay to the fund even though they had no accidents in their particular establishments. The industries of the state, however, were classified, so that the less dangerous ones would make proportionately smaller contributions. Mr. Justice Pitney found this form of compulsory insurance substantially similar to that required of banks in the Oklahoma depositors' guarantee law sustained in Noble State Bank v. Haskell.[22] It required no more than what most business men seek voluntarily, i.e., a pooling of their risks by insurance so that they may be safe from the dangers of extraordinary catastrophies. Four justices dissented in this case, including Mr. Justice McKenna. The other compensation decisions were unanimous.

In Bowerstock v. Smith,[23] decided on the same day as the compensation cases, an employer sought to escape from liability imposed by statute for injuries due to defective appliances, by showing that the injured employee was by his contract charged with the duty to keep the machinery safe, and was therefore injured solely by his own neglect. But the Chief Justice answered that it was proper for the state to make the duty on the employer an absolute one which he could not shift by contract. He saw no merit in the complaint that this resulted in discrimination against corporations in favor of individuals, because corporations must in all cases perform that duty through agents on whom they must rely, while individual employers can give such matters their personal attention. It seems reasonable that such a voluntarily acquired characteristic as corporate impersonality must be accepted with the disabilities inherent in the very privilege sought.

When we turn from decisions involving what is commonly termed labor legislation to those dealing with other exercises of the police power, we find considerably less disagreement among the judges. In spite of the vigor with which voluminous objections were urged against "Blue Sky" legislation, Mr. Justice McReynolds was the only one who deemed it unconstitutional.

[22] (1911) 219 U. S. 104.
[23] (1917) 243 U. S. 29.

The Ohio law was sustained in Hall v. Geiger-Jones Co.[24] The complainant had made no attempt to secure from the superintendent of banks a license to deal in securities, as the law required, yet he raised the objection that the statute gave arbitrary power to the state official, since there was no standard of what was "business integrity" and what was of good repute. But the court answered that it was "a little surprised that it should be implied that there is anything recondite in a business reputation or its existence as a fact which should require much investigation." And it was said to be "apparent that if the conditions are within the power of the state to impose, they can only be ascertained by an executive officer." Under the statute there might be judicial review of the officer's judgment, so that the court had little difficulty in relying on the assumption that the superintendent would not wantonly or arbitrarily deny a license to a reputable dealer. The opinion deals summarily with two pages of allegations of baneful discriminations in the provisions of the statute, dismissing them with the answer that the state "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses."

The Ohio statute required the superintendent to pass judgment on the character and reputation of the person offering securities for sale. The statute of South Dakota, sustained in Caldwell v. Sioux Falls Stock Yards Co.,[25] and that of Michigan, sustained in Merrick v. N. W. Halsey & Co.,[26] subjected the securities to the judgment of an administrative official and directed him to ascertain whether their sale would work a fraud on the purchaser. Judicial review of the administrative determination was provided by the South Dakota statute, and the statement of facts in the Michigan case says that the law of Michigan is almost identical with that of South Dakota. Both

[24] (1917) 242 U. S. 539. See C. D. Laylin, "The Ohio 'Blue Sky' Laws," 15 *Michigan Law Review* 369; and R. S. Spielman, "The Constitutionality of Blue Sky Laws," 49 *American Law Review* 389. See also 84 *Central Law Journal* 99, 17 *Columbia Law Review* 244, and 65 *University of Pennsylvania Law Review* 785.

[25] (1917) 242 U. S. 559.

[26] (1917) 242 U. S. 568.

statutes were regarded by the court as designed to protect only against fraud, and not to seek to prevent financial loss from other causes. It was declared that the fact that fraud might be practiced in a business was enough to subject it to the licensing power, and that it was not essential that fraud be necessarily incidental to the business. The contentions urged against the statute were so numerous that the court does not undertake to deal with them in detail; but the opinions of Mr. Justice McKenna deal with the substance of the objections in a masterly fashion, which makes them a valuable contribution to judicial literature on the police power.[27]

The question whether a state may put an end to the trading-stamp enterprise, upon which state courts have been divided, was settled by the Supreme Court in the affirmative in Rast v. Van Deman & Lewis Co.,[28] which sustained a statute of Florida, and Tanner v. Little[29] and Pitney v. Washington[30] which upheld the Washington law. Both statutes imposed license taxes on merchants and others issuing redeemable coupons with sales of goods. The amount was so high that the court conceded that it was prohibitive. "Of course," said Mr. Justice McKenna, "it is an exercise of the police power of the state." The cases thus throw no light on the mooted question whether a state may tax out of existence a business that it may not directly prohibit.

[27] Of the statute in question, the learned justice says: "It burdens honest business, it is true, but burdens it only that, under its forms, dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its function. It costs something to be governed." And of the objection that the law "shields contemplated purchasers from loss of property by the exercise of their own 'defective judgment' and puts them as well as the sellers under guardianship," he says: "If we may suppose that such purchasers would assert a liberty to form a 'defective judgment,' and resent means of information as a limitation of their freedom, we must wait until they themselves appear to do so."

[28] (1916) 240 U. S. 432. See C. S. Duncan, "The Economics and Legality of Premium Giving," 24 *Journal of Political Economy* 291. See also 29 *Harvard Law Review* 779, 24 *Journal of Political Economy* 498, 20 *Law Notes* 161, and 64 *University of Pennsylvania Law Review* 734.

[29] (1916) 240 U. S. 369.

[30] (1916) 240 U. S. 387.

The Supreme Court declined to accept the judgment of one of the lower federal courts that the use of trading stamps is an entirely legitimate form of advertising. Of the argument in their favor Mr. Justice McKenna observed that "it regards the mere mechanism of the schemes alone, and does not give enough force to their influence upon conduct and habit, not enough to their insidious potentialities." Though not exactly a lottery, trading stamps were said to have the "seduction and evil" of lotteries and gaming, in that "by an appeal to cupidity" they "lure to improvidence." The recognition that trading stamps are social parasites has the germ of an important development in these days when men are beginning to see more clearly that what is profitable to a few is not necessarily so socially useful that it is protected from harm by the due-process clause.

The Oklahoma depositors' guarantee law came before the court again in Langford v. Platte Iron Works Co.[31] which held, in a suit by an alleged depositor whose claim had not been recognized by the state board, that the constitutionality of the law was not affected by the fact that the state had vested title to the fund in itself so that depositors could not sue in the courts on claims disallowed. Four justices dissented as to the interpretation of the law, holding that, since the title of the state was a bare legal title, suit against the state board was not suit against the state. The dissenting opinion pointed out that the legislation was intended to convey the impression that the "deposits were to be secured by the fund, and not by the state," and observed that "it savors of repudiation to read into the scheme an unexpressed condition that renders the promise unenforceable by any means within the command of the promissee;" but it did not declare that the interpretation of the majority made the law unconstitutional. Since the state court had held that the board was not subject to mandamus, the state has vested an uncontrolled power to prefer some depositors of an insolvent bank at the expense of others. When states are more and more going into business, it is well to con-

[31] (1915) 235 U. S. 461.

sider whether their immunity from suit should extend beyond their distinctly political acts.[32]

Passing from finance to morals, we find three cases sustaining restrictions on the exhibition of moving pictures, against the objections that such censorship interferes with freedom of opinion and its expression, and delegates legislative power to administrative officials.[33] The display of such pictures was declared to be "a business, pure and simple, originated and conducted for profit, like other spectacles," and not to be regarded "as part of the press of the country, or as organs of public opinion." The power vested in the censors was held to be merely "a power to ascertain the facts and conditions" to which the policy and principles of the statute apply. The anemia of the principle of the separation of powers is indicated by statements in the opinions that "cases have recognized the difficulty of the exact separation of the powers of government," and that "the exact specification in statutes of the instances of their application would be as impossible as the attempt would be futile."

Somewhat difficult to classify is Waugh v. Board of Trustees,[34] which sustained a statute of Mississippi which, as enforced, excluded from the state university all members of Greek-letter fraternities who declined to refrain from participation in the activities of their chapters, even though this was a chapter in a private institution from which they had graduated. The complainant was willing to give a pledge not to affiliate in any way with any chapter in the university to whose law school he was seeking admission; but the court declined to go into the refinement of particular cases, and declared that it was for the

[32] The doctrine of the Langford Case was followed in Farish v. State Banking Board, (1915) 235 U. S. 498, in which it was held that the immunity of the state from suit was not waived by the unauthorized participation of the banking board in previous litigation between the same parties.

[33] Mutual Film Corporation v. Industrial Commission of Ohio, (1915) 236 U. S. 229; Same v. Same, (1915) 236 U. S. 247; and Mutual Film Corporation of Missouri v. Hodges, (1915) 236 U. S. 248. See 49 *American Law Review* 612, and 13 *Michigan Law Review* 515.

[34] (1915) 237 U. S. 589. See 50 *American Law Review* 126, 81 *Central Law Journal* 39, and 51 *National Corporation Reporter* 50.

state to determine whether membership in a fraternity "makes against discipline." It suggested that the enactment "may have been induced by the opinion that membership in the prohibited societies divided the attention of students, and distracted from that singleness of purpose which the state desired to exist in its public educational institutions," and added that "it is not for us to entertain conjectures in opposition to the views of the state, and annul its regulations upon disputable considerations as to their wisdom and necessity." Thus Mississippi is made safe for the pursuit of democracy and the higher intellectual life.

A more direct way of inducing worthy toil came before the court in Butler v. Perry,[35] which sustained a statute of Florida requiring every able-bodied male person between the ages of twenty-one and forty-five to labor six days a year on the highways of the state, or furnish a substitute or pay three dollars. Against the objection that this was an imposition of involuntary servitude, it was pointed out that "from colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads." The reasoning of the opinion consists almost entirely of the recital of historical precedents. Nevertheless the decision must be regarded as of important significance on the constitutionality of legislation forbidding strikes[36] and on the propriety of the increasing number of "anti-loafing" laws.

Three cases sustained the power of the state to license optometrists,[37] private detectives,[38] and "drugless practitioners."[39] In each case the charge of discrimination was made and dismissed. A drugless practitioner who used faith, hope, and

[35] (1916) 240 U. S. 328. See 2 *Virginia Law Register*, n.s. 60.

[36] See A. A. Ballantine, "Railway Strikes and the Constitution," 17 *Columbia Law Review* 502, and T. I. Parkinson, "Constitutional Aspects of Compulsory Arbitration," 7 *Proceedings of the Academy of Political Science of New York* 44.

[37] McNaughton v. Johnson, (1917) 242 U. S. 344. See 15 *Michigan Law Review* 516.

[38] Lehon v. Atlanta, (1916) 242 U. S. 53. See note in the Lawyers' Edition of the Supreme Court Reports, vol. 61, p. 146.

[39] Crane v. Johnson, (1917) 244 U. S. 339.

mental suggestion was given no comfort because his rivals who used prayer were immune from regulation. The court said that it could not declare that the state's estimate of the difference between prayer and other practices was arbitrary and therefore beyond the power of government. A person who called herself an ophthalmologist complained that persons of her ilk were discriminated against in favor of optometrists, but since she failed to enlighten the court as to the difference between the two, she was denied relief. The detective caught practicing without a license was a nonresident. His allegation that the administration of the ordinance discriminated against nonresidents was not considered, because he had made no attempt to secure a license. The ordinance seemed to give the board of police commissioners uncontrolled discretion in granting and refusing licenses, and to set no standard of fitness to be applied to applicants; but it was sustained, without mention of these features, as a regulation of "one of the necessary activities of government." The idea of the court seemed to be that detectives exercised governmental functions, and that therefore the state had practically complete power in determining who should fill the rôle.

In enumerating the cases under the commerce clause,[40] mention has already been made of the decisions sustaining statutes forbidding the sale of food preservatives containing boric acid,[41] requiring lard sold at retail to be put up in one, three, or five pound packages net weight, or some multiple of these numbers,[42] and forbidding the shipment from the state of citrous fruits which are immature or otherwise unfit for consumption.[43] Only the first of these statutes can be regarded as passed for the purpose of protecting health. The North Dakota statute with respect to lard was a sequel to an earlier one requiring each package to bear a label stating the net weight. The Supreme Court accepted the judgment of the state court that the later

[40] 12 *American Political Science Review* 37–38.

[41] Price v. Illinois, (1915) 238 U. S. 466.

[42] Armour & Co. v. North Dakota, (1916) 240 U. S. 510.

[43] Sligh v. Kirkwood, (1915) 237 U. S. 52. See 80 *Central Law Journal* 361, and 28 *Harvard Law Review* 819.

statute was necessary to make it entirely clear to a purchaser just how much lard he was getting, and to differentiate between what he was paying for lard and what for a tin pail. The statute was upheld as one designed to prevent deception. The Florida law forbidding the exportation of green oranges was sanctioned as one passed for the purpose of protecting the reputation and character of Florida fruits in the markets of other states.

In another case involving food regulations, the object of the statute was not the protection of health. Hutchinson Ice Cream Co. v. Iowa[44] sustained a statute of Pennsylvania prohibiting the sale of ice cream containing less than 8 per cent of butter fat, and a similar statute of Iowa making the minimum 12 per cent. The opinion states that no objection was made to the minimum fixed by these statutes, provided the regulations were otherwise constitutional. It notes that 12 other states have similar statutes fixing the minimum at 14 per cent; 5 other states, 12 per cent; while the United States department of agriculture fixes 14 per cent as the standard, and only 8 states have a minimum as low as Pennsylvania. The complainants contended that "ice cream" had come to be a generic name for a variety of wholesome products which in fact were not made from dairy cream. But the court held that the statutes merely enabled the purchaser to know exactly what he was getting when he called for ice cream, and observed that the legislature might conclude that fraud or mistake can be effectively prevented only by prohibiting the sale of the article under the usual trade name, if it fails to meet the requirements of the standard set. It was assumed that these wholesome products which had masqueraded under the name of ice cream might still be sold. But the complaining so-called Ice Cream Company evidently thought that its product by any other name would not be so acceptable to purchasers, and that it was entitled to be protected in the enjoyment of the name it had filched.

A number of cases related to restrictions upon the use of property or to impositions of positive duties upon the owners

[44] (1916) 242 U. S. 153. See 26 *Yale Law Journal* 416.

of property. Reinman v. Little Rock[45] sanctioned an ordinance forbidding the continuance of a livery stable in a densely populated and busy part of a city. The court assumed that the decree of the state court was based on the confession by demurrer of the facts alleged by the city that the stables in question were conducted in a careless manner, with offensive odors, and so as to be productive of disease. It was implied that a different question would be raised if the facts were, as alleged by the owner, that the stables were properly conducted and had been so conducted for a long time in the same location, and at large expense for permanent structures, and that the removal to another location would be very costly. Thus the decision does not stand for the proposition that a good stable may be outlawed, even in a populous part of the city.

Yet the fate meted out to a brickyard in Hadacheck v. Sebastian[46] may well cause even the best livery stable to tremble. This case sustained an ordinance of Los Angeles prohibiting brickmaking within a designated area. The complainant alleged that his property was worth $800,000 for brickmaking purposes, and not over $60,000 for any other purpose. This does not seem to have been specifically denied, although the state court in sustaining the ordinance had considered the case from the standpoint of the offensive effect of the operation of the brickyard, and not from that of the deprivation of the use of the deposits of clay, thereby distinguishing Ex parte Kelso,[47] in which the California court declared invalid an ordinance absolutely prohibiting the operation of a stone quarry within a certain portion of the city. The Supreme Court decided the case on the assumption that the owner might still dig his clay and cart it elsewhere, and that his property, though greatly reduced in value, was not entirely taken away. "It is to be remembered," said Mr. Justice McKenna, "that we are dealing with one of the most essential powers of the government,—one that is the least

[45] (1915) 237 U. S. 171. See 19 *Law Notes* 51.

[46] (1915) 239 U. S. 384. See 1 *Southwestern Law Review* 47, and 44 *Washington Law Reporter* 714.

[47] 147 Cal. 609.

limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exercised arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."

A Chicago billboard ordinance was sustained in Thomas Cusack Co. v. Chicago.[48] This prohibited the erection of any billboard over 12 square feet in area in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, without first securing the consent of a majority of the owners on both sides of the block. The court avoided the issue whether the police power may be used for aesthetic purposes, by accepting at face value the findings of the state supreme court that "fires had been started in the accumulation of combustible material which gathered about such billboards, that offensive and unsanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices and for loiterers and criminals." The state supreme court had held that the trial court had erroneously excluded evidence offered by the city to show that residence areas did not have as full police and fire protection as business areas, that the streets of residence sections are more frequented by unprotected women and children than, and are not so well lighted as, other sections of the city, and that most of the crimes against women and children are offenses again their persons. The purpose of such evidence was of course to rebut the contention of the billboard owners that the limited area to which the ordinance applied proved that it could not have been passed for the protection of health, morals and safety.

[48] (1917) 242 U. S. 526. See 84 *Central Law Journal* 155, 3 *Cornell Law Quarterly* 135, 15 *Michigan Law Review* 502, 1 *Minnesota Law Review* 441, 2 *Southern Law Quarterly* 233, 65 *University of Pennsylvania Law Review* 686, 2 *Virginia Law Register*, n.s. 940, and 26 *Yale Law Journal* 420.

The Supreme Court of the United States declared that even without the testimony improperly excluded, there was enough to show the propriety of putting billboards in a class by themselves, and to "justify the prohibition against their erection in residence districts of the city in the interest of the safety, morality, health and decency of the community." The court referred to its disposition to "favor the validity of laws relating to matters completely within the territory of the state enacting them," and to its reluctance to disagree "with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned." Mr. Justice McKenna dissented, without opinion. The case seems to be an entering wedge to a modification and possibly an abandonment of the notion that aesthetic considerations do not furnish a sufficient warrant for restrictions on the use of private property.[49] Fanciful considerations lugged in by the heels as an aid in distinguishing prior cases are not infrequently the prelude to overruling them.

Ordinances prohibiting the emission of dense smoke furnish another instance where economic and aesthetic considerations reinforce the professed object of promoting health. Such an ordinance was sustained in Northwestern Laundry v. Des Moines.[50] The opinion declared that "the harshness of such legislation, or its effects on business interests, short of merely arbitrary enactment, are not valid constitutional objections." An additional service to cleanliness was rendered by Booth v. Indiana,[51] which sustained a statute requiring operators of certain industries to provide suitable washhouses or washrooms upon the request in writing of twenty or more of their em-

[49] See Eubank v. Richmond, (1912) 226 U. S. 137. On the general subject of aesthetics and the police power, see H. L. McBain, *American City Progress and the Law*, chapter 2. See also E. L. Millard, "Present Legal Aspect of the Billboard Problem," 11 *Illinois Law Review* 29, and a note on "Aesthetics and the Fourteenth Amendment," in 29 *Harvard Law Review* 860.

[50] (1916) 239 U. S. 486. See 4 *California Law Review* 416, and 16 *Columbia Law Review* 239.

[51] (1915) 237 U. S. 391.

ployees, or if less than twenty are employed, upon the request of one-third of those employed.

The direct relation to health and safety of the statute sustained in Miller v. Strahl[52] is readily apparent. The case established that a statute imposing on innkeepers having hotels of more than fifty rooms the duty to do all in their power to give notice to guests in case of fire is within the police power, at least where applied to a case in which through failure to make any adequate investigation a guest was permitted to sleep for two hours after indications that fire existed. It was urged that the statute was unconstitutional because too indefinite, but the court said that rules of conduct must necessarily be expressed in general terms, and that what would constitute "all within one's power" must vary with circumstances.[53]

That part of the police power which imposes restrictions and duties on public carriers depends upon special considerations which do not apply to police power in general. Prescriptions of rates and facilities of service are imposed quite independently of any solicitude for health, safety or morals. The general public welfare has here found a recognition which is not yet accepted as a justification for requirements on those engaged in purely private undertakings. Nevertheless the due-process clause is a shield to public-service enterprises against unreasonable or arbitrary requirements, and in a number of cases decided during the period under consideration, judicial relief has been granted against legislative and administrative commands.

[52] (1915) 239 U. S. 426.

[53] It was also contended that the statute was invalid because it did not apply to hotels having less than fifty rooms, and therefore discriminated against larger hotels, but the contention was not sustained. For a case in which a provision of the Louisiana anti-trust law was declared invalid because so framed as to apply exclusively to the American Sugar Refining Co., see McFarland v. American Sugar Refining Co., (1916) 241 U. S. 79. The statute also created certain presumptions from paying more for sugar in other states than in Louisiana, and from closing or keeping idle a factory more than a year. The opinion of the court indicates that these presumptions would have been held vicious, even if the statute had not been invalid because of its discriminatory features. See 1 *Southern Law Quarterly* 279.

The most interesting of these cases is Chicago, M. & St. P. R. Co. v. Wisconsin,[54] which declared it unconstitutional to forbid a sleeping-car company to let down an unoccupied and unengaged upper berth, when the lower berth in the same section is occupied. The statute was characterized as one which sought to compel an owner to permit others to enjoy his property without pay. It was held vicious as an unwarranted interference with the management of complainant's business, as well as a taking of its property. And the right to amend corporate charters was declared not to authorize the taking of property without compensation. Justices McKenna and Holmes dissented, without opinion. Justices Brandeis and Clarke had not at this time succeeded Justices Lamar and Hughes. The contention that the act was a health measure, in that compliance with it would tend to improve the ventilation of the car for the benefit of all its occupants, was rejected on the grounds that the act did not purport to be a health measure, and that if it were designed for this object, it should not have permitted any occupancy of upper berths. Weight was given to the argument of the company that sleep and privacy would be interfered with by letting down upper berths after the occupant of the lower berth had entered into his rest. Such would of course be the result of the operation of the statute when upper berths were purchased subsequent to the occupancy of the one below.

Two cases which depend on their special facts reversed orders to carriers to restore to service certain passenger trains[55] and to make switching arrangements with other carriers.[56] In Great Northern R. Co. v. Minnesota,[57] the court reversed an order of a state commission requiring a carrier to install scales at its stockyards in a given village, without first giving it an opportunity to abate any existing discrimination against the village

[54] (1915) 238 U. S. 491. See 51 *National Corporation Reporter* 241, and 64 *University of Pennsylvania Law Review* 77.

[55] Mississippi R. Com. v. Mobile & O. R. Co., (1917) 244 U. S. 388. See 27 *Yale Law Journal* 121.

[56] Louisville & N. R. Co. v. United States, (1916) 242 U. S. 60. See 17 *Columbia Law Review* 347, and 2 *Southern Law Quarterly* 165.

[57] (1915) 238 U. S. 340.

by discontinuing similar scales at other near-by stockyards. Such service was held one which a carrier was under no duty to provide, so long as it did not by furnishing such facilities elsewhere discriminate against one locality in favor of another.

In two cases, rates prescribed by the legislature were declared invalid because they did not produce the requisite "fair return" on the "fair value." Norfolk & W. R. Co. v. Conley[58] annulled a legislative prescription of a flat two-cents per mile rate for passenger traffic, where it appeared that the rate would yield but a narrow margin above the cost of traffic. Northern P. R. Co. v. North Dakota[59] relieved the complainant from rates prescribed for transportation of coal in carload lots, where the rates would yield little if any more than the out-of-pocket costs for the carriage of the particular commodity, even though the returns from the entire intrastate operations would still be adequate. Mr. Justice Pitney dissented in both cases, but without rendering opinions.

Much more numerous were the cases in which requirements on carriers were sustained. Missouri P. R. Co. v. Omaha[60] required a railroad to construct a viaduct across its tracks and to bear the whole expense thereof, even though a considerable part of the expense was occasioned by the necessity of making the structure sufficiently strong to support the tracks of a street railway company enjoying a franchise to use the streets. Rome Railway & Light Co. v. Floyd County[61] compelled a street railway to share the cost of removing old highway bridges and building new ones along the route over which its tracks ran. In one case a railroad was required to build a new bridge over a drainage ditch,[62] and in another the cost of a similar bridge was put on an irrigation company.[63] Chicago & A. R. Co. v. Tran-

[58] (1915) 236 U. S. 605. See 1 *Southern Law Quarterly* 56.

[59] (1915) 236 U. S. 585.

[60] (1914) 235 U. S. 121.

[61] (1917) 243 U. S. 257.

[62] Lake Shore & M. S. R. Co. v. Clough, (1917) 242 U. S. 375. See Louisville Bridge Co. v. United States, (1917) 242 U. S. 409, for a case sustaining an order of the secretary of war compelling the elevation of a bridge so as to lessen the interference with commerce on the river below.

[63] Farmers' Irrigation District v. Nebraska, (1917) 244 U. S. 325.

barger[64] held that a railroad could be compelled to construct transverse openings in rights of way and roadbeds to take care of surface water. Chicago, T. H. & S. R. Co. v. Anderson[65] sustained an Indiana statute requiring railway companies to cut down and destroy noxious weeds on lands occupied by them. The further provision allowing any person aggrieved by a company's neglect to comply with the statute to recover a penalty of $25 was also sustained, where the provision had been given by the state court no broader scope than to permit a single recovery by a contiguous landowner.

Several cases sustained orders compelling track connections[66] and interchange of traffic.[67] Others sanctioned orders to street railroads to carry policemen free,[68] to carry passengers beyond the limit of the particular franchise held by the company,[69] and to double-track a portion of the line.[70] The Arkansas full-crew law was sustained in St. Louis, I. M. & S. R. Co. v. Arkansas.[71] It required switching operations in cities of the first and second class to be conducted with a crew of not less than one engineer, a fireman, a foreman, and three helpers. Chesapeake & O. R. Co. v. Public Service Commission[72] sustained an order compelling passenger service on a branch line hitherto used only for freight, although the service so ordered, separately considered, would be conducted at a loss.

Van Dyke v. Geary[73] held, Mr. Justice McReynolds alone dissenting, that it was proper to subject to rate regulation a

[64] (1915) 238 U. S. 67.

[65] (1916) 242 U. S. 283.

[66] Seaboard Air Line Ry. Co. v. Railroad Commission, (1916) 240 U. S. 324.

[67] Michigan C. R. Co. v. Michigan Railroad Commission, (1915) 236 U. S. 615; Louisville & N. R. Co. v. United States, (1915) 238 U. S. 1; Pennsylvania Co. v. United States, (1915) 236 U. S. 351. See 28 *Harvard Law Review* 799.

[68] Sutton v. New Jersey, (1917) 244 U. S. 258. See 3 *Virginia Law Register*, n.s. 376.

[69] Puget Sound Traction L. & P. Co. v. Reynolds, (1917) 244 U. S. 574. See 66 *University of Pennsylvania Law Review* 83.

[70] Phoenix R. Co. v. Geary, (1915) 239 U. S. 277.

[71] (1916) 240 U. S. 518.

[72] (1917) 242 U. S. 603. See 84 *Central Law Journal* 209, 3 *Iowa Law Bulletin* 245, and 62 *Ohio Law Bulletin* 241.

[73] (1917) 244 U. S. 39.

water system owned by a private individual who delivers water to adjoining landowners in pipes at the boundary between his land and theirs. Terminal Taxicab Co. v. Kutz[74] allowed the District of Columbia to subject a taxicab company to rate regulation as a public utility for such part of its service as consists in regularly carrying passengers between the station and hotels, but not for that part which consists in furnishing automobiles to persons who apply for them from the garage. In Wadley S. R. Co. v. Georgia,[75] a railroad was compelled to discontinue the practice of demanding prepayment of freight from one connecting carrier when it did not exact such prepayment from another. A trunk line railroad was forbidden in O'Keefe v. United States[76] to give rebates or bonuses to tap lines owned by shippers. And in Missouri P. R. Co. v. McGrew Coal Co.[77] the court sustained a provision in the Missouri constitution which forbade railroads to charge more for a shorter than for a longer intrastate haul, and gave shippers an absolute right to recover any overcharge. The opinion intimated that special circumstances might make it improper to enforce the provision in particular cases, but declared that the fact that the state constitution did not make provision for such special circumstances did not make it necessarily invalid.

Three cases involved statutes imposing liabilities on carriers. Chicago & A. R. Co. v. McWhirt[78] held that it was proper for a state to apply to a domestic railroad company which had leased its road to a foreign corporation, a statute passed prior to the lease making the lessor jointly liable with the lessee for any actionable tort of the latter. The statute sustained in Atlantic C. L. R. Co. v. Glenn[79] provided that all carriers participating in an intrastate shipment are agents of each other, so that any one may be sued for an injury to goods occurring on any part of the route, the one so sued being given the right of recovery

[74] (1916) 241 U. S. 252. See 17 *Columbia Law Review* 710.
[75] (1915) 235 U. S. 651. See 63 *University of Pennsylvania Law Review* 430.
[76] (1916) 240 U. S. 294.
[77] (1917) 244 U. S. 191.
[78] (1917) 243 U. S. 422.
[79] (1915) 239 U. S. 388. See 82 *Central Law Journal* 80.

over against the carrier in fault. The liability imposed on a railroad in Santa Fe P. R. Co. v. Lane[80] was suffered, not because the railroad was a carrier, but because it was a grantee of public lands which had made default. It was therefore compelled to pay for the cost of making surveys of the patented lands, and the statute was sustained against the plaint of the railroad that it violated its previously vested rights.

It is apparent that most of the cases brought by railroads to the Supreme Court involve no important questions of constitutional law. They raise merely issues of fact and questions of judgment as to what is fair and reasonable. Not infrequently these cases are the most involved and intricate with which the court has to deal. In comparatively few cases are the orders and statutes complained of annulled. It would materially lighten the burdens of the Supreme Court if some way could be found to protect its calendar from this kind of litigation.

III. TAXATION

Cases involving the power of a state to tax foreign corporations engaged partly in interstate commerce were considered in the previous installment of this catalogue.[81] Analogous questions are presented by state taxes alleged to interfere with some federal agency. Thus in Choctaw, O. & G. R. Co. v. Harrison[82] it was held that a state cannot impose a privilege tax on a corporate lessee of coal mines on unallotted lands belonging to Indian tribes under the wardship of the national government. On the other hand, Fidelity & Deposit Co. v. Pennsylvania[83] held that a surety company does not by furnishing bonds to contractors for the United States government become thereby a federal agency so as to be immune from state taxation on the premiums received. So also in Bothwell v. Bingham County[84] a state was allowed to tax land formerly belonging to the national government, when

[80] (1917) 244 U. S. 492.
[81] 12 *American Political Science Review* 29–32.
[82] (1914) 235 U. S. 292.
[83] (1916) 240 U. S. 319. See 82 *Central Law Journal* 279.
[84] (1915) 237 U. S. 642.

the entire beneficial interest had passed to a private individual, even though he has not yet received his patent.

The question whether memberships in an unincorporated chamber of commerce, which had no capital and transacted no business for profit, were taxable as property came before the court in Rogers v. Hennepin,[85] and was answered in the affirmative. It was also held proper for the state to fix the situs of such membership at the place where the exchange was located and where its members did business, even though they were domiciled elsewhere. Another question involving the situs of intangibles arose in Bullen v. Wisconsin,[86] which allowed a state to impose an inheritance tax on a fund kept and managed in another state for the benefit of a decedent domiciled in the taxing state, who reserved to himself in his life time the absolute control over the fund.

Two cases involved taxation on foreign insurance companies. In Provident Sav. L. Assur. Soc. v. Kentucky,[87] a company which solicited no new business within the state, but merely continued existing policies on the lives of residents, collecting the renewal premiums at its home office, was held not to be doing business in the state, and was therefore declared immune from taxation. But if the company is writing some new business within the state, Equitable L. Assur. Soc. v. Pennsylvania[88] holds that a tax on premiums received from business done within the state may include the premiums paid in other states on policies on the lives of residents of the taxing state. Thus the state is allowed to include in its measure of assessment certain items which would not, if separately considered, afford jurisdiction to tax at all. It was pointed out that many incidents of the contracts were likely to be attended to in the taxing state, such as the payment of dividends and the adjustment of death claims. "It is not unnatural," said Mr. Justice Holmes, "to take the policy holders residing in the state as a measure, without going into nicer if not impracticable details. Taxation has to be

[85] (1916) 240 U. S. 184.
[86] (1916) 240 U. S. 625.
[87] (1915) 239 U. S. 103.
[88] (1915) 238 U. S. 143.

determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows."

In two cases, property owners who resisted special assessments were granted relief. Myles Salt Co. v. Board of Commissioners[89] found that an island was on such high ground that it could not possibly receive any advantage from a drainage improvement, and that therefore any assessment was a taking of property without due process of law. And Gast Realty & I. Co. v. Schneider Granite Co.[90] relieved the complainant from subjection to a method adopted by a city for assessing the cost of street paving, where the line of the land made to bear the burden zigzagged about in a fashion which led Mr. Justice Holmes to characterize the ordinance as "a farrago of irrational irregularities throughout." In Wagner v. Leser,[91] on the other hand, the situation was such that it was held proper to apply the foot-frontage rule in assessing the cost of pavement on abutters, and further that it was unnecessary to give notice and a chance to be heard as to the amount of benefit. Justices Pitney and McReynolds dissented.[92]

Several cases involved complaints against the procedure provided for assessing taxes. Bi-metallic Investment Co. v. State Board of Equalization[93] held that an order to make an increase in the assessment of all property within a given district was valid, although taxpayers had no other opportunity to be heard before the board issuing the order than that afforded by reason of the fact that the time of meeting is fixed by law. If individual notice were required in such cases, it would have to be given to every taxpayer in the district, since all were affected

[89] (1916) 239 U. S. 478. See 14 *Michigan Law Review* 502, and 1 *Southern Law Quarterly* 256.

[90] (1916) 240 U. S. 55. See 82 *Central Law Journal* 189 and 14 *Michigan Law Review 419.*

[91] (1915) 239 U. S. 207.

[92] For another case in which a special assessment was sustained, see Houck v. Little River Drainage District, (1915) 239 U. S. 254, which held that a maximum tax of 25 cents an acre could be imposed upon lands within a drainage district to defray preliminary expenses, even though some of the owners assessed may not be benefited by the completed drainage plans.

[93] (1915) 239 U. S. 441. See 29 *Harvard Law Review* 550.

alike by the increase. "There must be a limit to individual argument in such matters," said Mr. Justice Holmes, "if government is to go on." So also in Embree v. Kansas City & L. B. Road District,[94] notice by publication was held sufficient in proceedings to determine whether a road district should be created, where the boundaries of the proposed district were published and could not be enlarged unless the owners of lands not previously included consented or appeared at a hearing. In Pullman Co. v. Knott,[95] a company which failed to make returns of its receipts as required by statute was held not entitled to complain of a provision in the tax law allowing the state comptroller on such default to estimate the receipts and add 10 per cent as a penalty. For more involved cases in which the statutory procedure was sustained see St. Louis & K. C. Land Co. v. Kansas City,[96] and Chapman v. Zobelein.[97]

Two important tax cases were based on a provision of the Kentucky constitution requiring uniform taxation in proportion to value. These were Greene v. Louisville & I. R. Co.[98] and Louisville & N. R. Co. v. Greene.[99] In both cases it was established that the property of the complainants was intentionally assessed at a larger percentage of its true value than was property generally, but all property, including that of complainants was assessed at less than its true value. The assessment on the complainants was enjoined as a violation of the constitutional provision of uniformity, although the result of the injunction was to sanction the violation of another provision requiring assessment at true value. The situation presented a dilemma, since the enforcement of either provision required the violation of the other. The court regarded the requirement of uniformity as the major one, to which the provision for assessment at full value was subsidiary. The dilemma was created because the assessment of railroad property was in the hands of a different board

[94] (1916) 240 U. S. 242.
[95] (1914) 235 U. S. 23.
[96] (1916) 241 U. S. 419.
[97] (1914) 237 U. S. 135.
[98] (1917) 244 U. S. 499. See 31 *Harvard Law Review* 307.
[99] (1917) 244 U. S. 522.

from that which valued other property, and it was therefore impossible for the court to order the increase in the assessment of other property.

Federal jurisdiction was obtained in these cases by claims made under the equal-protection clause of the Fourteenth Amendment; but the court said that, having the case properly before it, it had power to dispose of every question in issue, and that since its interpretation of the Kentucky constitution sustained the objections of complainants, it was unnecessary to decide whether the same result would be required by the Fourteenth Amendment. The second case involved also some intricate computations in applying the "unit rule" to the assessment of that part of an interstate railroad located within the state. The methods adopted by the state board were found to be faulty in several respects. Justices Holmes, Brandeis and Clarke dissented in both cases.

The taxing power of the federal government was limited by two decisions establishing that a stamp tax on charter-parties[100] and on marine insurance policies[101] was a tax on exports and so within the constitutional prohibition on Congress, when the charter related only to the exportation of cargo to foreign ports, and the policy covered only such goods. The charter-party and the insurance policy were held to be essential to the exporting process, so that taxes thereon were in a substantial sense taxes on exports.

Objections to the national income tax of 1913 were considered and dismissed in four cases.[102] The progressive rate features were held not to be so arbitrary and unjust as to be wanting in due process. Likewise impeccable are the provisions imposing

[100] United States v. Hvoslef, (1915) 237 U. S. 1. See C. N. Goodwin, "United States v. Hvoslef: A Constitutional Source of National Revenue Impaired," 29 *Harvard Law Review* 469.

[101] Thames & Mersey M. Ins. Co. v. United States, (1915) 237 U. S. 19.

[102] Brushaber v. Union Pacific R. Co. (1916) 240 U. S. 1; Stanton v. Baltic Mining Co., (1916) 240 U. S. 103; Tyee Realty Co. v. Anderson, (1916) 240 U. S. 115; Dodge v. Osborn, (1916) 240 U. S. 118. See F. W. Hackett, "Constitutionality of the Graduated Income Tax Law," 25 *Yale Law Journal* 427. See also 4 *California Law Review* 336, 26 *Columbia Law Review* 530, 14 *Michigan Law Review* 680, and 64 *University of Pennsylvania Law Review* 498.

a surtax on individual but not on corporate incomes; allowing individuals but not corporations to deduct from their gross income dividends from corporations whose incomes are taxed; limiting the amount of interest paid by a corporation which may be deducted from its gross income for the purpose of fixing its taxable income;[103] exempting individuals but not corporations on income up to $4,000; exempting certain organizations from the tax altogether; and applying the statute to income received before its enactment but subsequent to the date when the Sixteenth Amendment went into effect. The act was also acquitted of a number of other peccadillos charged against it by complaining taxpayers. It seemed to be conceded by the court, however, that a taxing statute of Congress might be so arbitrary "as to compel the conclusion that it was not an exertion of taxation, but the confiscation of property."

Chief Justice White's discussion of the effect of the Sixteenth Amendment is interesting from the standpoint of the objections urged against its ratification by Mr. Hughes, when governor of New York. His complaint was that the grant to Congress of power to tax incomes "from whatever source derived" conferred authority to tax incomes of state officials and incomes from state and municipal bonds. But any such interpretation is impliedly negatived by the position of the Chief Justice. He holds that Congress always had power to levy income taxes "in a general sense," and that the Sixteenth Amendment was necessary only because the Income Tax cases of 1895 had declared that the court must look to the source of the income taxed, in order to determine whether the tax though in form an indirect tax was in substance a direct tax, and therefore one requiring apportionment among the states according to population. The Sixteenth Amendment merely forbids the court to look at the source of the income taxed in order to determine whether the tax is direct. It leaves the general power to levy income taxes subject to all other previous limitations and therefore does not remove the restrictions imposed by the principle inherent in the federal

[103] A similar provision on the corporation tax of 1909 was sustained in Anderson v. Forty-two Broadway, (1915) 239 U. S. 69.

system of government, that neither the states nor the nation may tax the necessary instrumentalities of the other.

IV. EMINENT DOMAIN

In three cases objectors to eminent domain proceedings failed to persuade the court that the taking was not for a public use. Hendersonville Light & P. Co. v. Blue Ridge R. I. Co.[104] sustained the condemnation of certain water rights by a street railway company, in spite of the fact that the contemplated works would generate more power than was necessary for the running of the road. The company's charter, however, authorized it to sell surplus power, and the taking was found to be with the intent in good faith to carry on the public business authorized by the charter. O'Neill v. Leamer[105] sanctioned a taking of land for a drainage ditch, where the district drained embraced a large area with many proprietors, and the state court had found that the undertaking did not serve private interest alone, but was conducive to public health, convenience and welfare. In Mt. Vernon Woodbury Cotton Duck Co. v. Alabama I. P. Co.[106] a similar judgment was passed upon a taking of land, water and water rights for the manufacture, supply and sale to the public of electric power produced by water as a motive force.

The issue whether there was in law a taking of property arose in several cases. Willink v. United States[107] held that an owner of a wharf and a marine railway suffered no taking of his property by being prevented from rebuilding his wharf or renewing the piling which protected his railway, where both wharf and piling were below the highwater line and within the harbor area defined by the secretary of war under authority from Congress.[108] In Cubbins v. Mississippi River Commission[109] the owner of

[104] (1917) 243 U. S. 563. See 54 *National Corporation Reporter* 902.

[105] (1915) 239 U. S. 244.

[106] (1916) 240 U. S. 30.

[107] (1916) 240 U. S. 572.

[108] To a similar effect is Greenleaf Johnson L. Co. v. Garrison, (1915) 237 U. S. 251. See 28 *Harvard Law Review* 806.

[109] (1916) 241 U. S. 351.

riparian land along the Mississippi River was held entitled to no damages for an alleged taking which consisted of an occasional overflow of his land caused by the increase in volume of the stream due to the erection of levees to confine the river in its natural course. But similar injuries due to the construction of a lock and dam as an aid to navigation were held in United States v. Cross[110] to constitute takings which entitled the riparian owner to compensation. The works in question were said to be not mere improvements of the natural waterway, but to amount to the construction of an artificial channel.

Three cases withheld comfort from landowners who appealed for more compensation than was allowed. Provo Bench Canal & I. Co. v. Tanner[111] refused to set aside the judgment of a state court awarding only nominal damages for a taking incident to the enlargement of an irrigation canal, where the state court recognized that compensation must be paid for any damage suffered, but held that there was no evidence of any such damage. Similarly in Brand v. Union Elevated R. Co. [112] a state court was held justified in refusing to submit to a jury the question of damages on account of the construction of an elevated road, where the only testimony as to the comparative market value of the abutting lot before and after the improvement showed that no change in value had occurred. Justices Day, McKenna, Lamar and Pitney dissented, assigning as the reason that there was testimony as to the actual injury caused by the road, and that the disposition of the case on the ground of the absence of proof of depreciation in the market value of the land in effect permitted the road to offset the specific damages done to complainant by the general benefits shared by him in common with the public. The majority do not discuss the validity of this proposition of law, but dispose of the case on the technical ground that the evidence before the court did not call it into play.

An ingenious contention of a landowner was rejected in New

[110] (1917) 243 U. S. 316. See 30 *Harvard Law Review* 764.
[111] (1915) 239 U. S. 323.
[112] (1915) 238 U. S. 846. See 81 *Central Law Journal* 145.

York v. Sage.[113] The land was taken for the Ashokan reservoir.[114] Mr. Sage claimed for it a special value due to the fact that it was so situated in a water-shed that it was adapted for use as a reservoir. The court recognized that account should be taken in general of enhancement due to the possibility of the most profitable use to which the land might be put, but held that such elements of value should be considered only so far as the public would have considered them if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain. Since the availability of the land for a reservoir was dependent on the acquisition of many other parcels by the exercise of the power of eminent domain, the alleged reservoir value of each lot was added to it by the city's act in uniting it to the other lots, and was therefore not a value which each lot possessed in the hands of its owner before being taken.

(To be concluded)

[113] (1915) 239 U. S. 57.

[114] Ramapo Water Co. v. New York, (1915) 236 U. S. 579, arose out of the same project, from which the complainant sought to restrain the city on the ground that it interfered with its vested rights acquired by a charter giving it power to store and supply water. The company had proceeded no further under its charter than to file maps and acquire options on some lands in the district to be taken for the municipal reservoir. The Supreme Court disposed of the contention by saying that in the absence of a decision on the point from the state court it would refuse to believe that the complainant had acquired any vested rights by what it had done under its charter.